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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. [redacted] 37.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

DONALD M. PAINTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

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Supreme Court of the United States.

October Term, 1966.

No. 929.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
DONALD M. PAINTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts is reported at 252 F. Supp. 851, and the opinion of the United States Court of Appeals for the First Circuit, dated November 10, 1966, is reported at 368 F. 2d 142.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 10, 1966. The

petition for certiorari was filed on January 3, 1967, and certiorari was granted on February 20, 1967. The jurisdiction of this court is invoked under 28 U.S. Code, § 1254 (1).

Questions Presented.

1. Should the state of mind of police officers nullify an arrest and an incidental search and seizure, conducted in accordance with reasonable, workable and lawful procedures?

2. Were the respondent's constitutional rights violated by admission into evidence of both property abandoned before arrest and property seized during a post-arrest search?

Constitutional Provisions and Statutes Involved.

1. Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Constitution of the United States, Amendment XIV:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

The respondent, Painten, filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts (R. 2-7). The petition was brought pursuant to 28 U.S. Code, § 2241 (a), and 28 U.S. Code, § 2254. Painten sought to set aside a conviction in the Middlesex Superior Court for armed robbery and related offenses. His conviction had been affirmed *sub nom. Commonwealth* v. *Binkiewicz,* 342 Mass. 740 (1961). The writ was granted, *Painten* v. *Commonwealth,* 252 F. Supp. 851 (D.C. Mass., 1966), and the Commonwealth appealed. The United States Court of Appeals for the First Circuit affirmed the decision. *Commonwealth* v. *Painten,* 368 F. 2d 142 (1st Cir., 1966). This court granted certiorari on February 20, 1967.

The facts material to the consideration of the questions presented are as follows:

On or about March 1, 1958, Emmett McNamara and Herbert Maxwell, two plainclothes officers of the Boston Police Department, observed the respondent and one George Ash in an automobile in the South End of Boston (R. 24). George Ash was known to the officers personally and Painten was identified from a "mug shot" in the pocket of Officer McNamara (R. 24-25). Both men were known to have records (R. 26, 33). There had been a rash of liquor-store holdups, and a loan-company holdup that day, which robberies were known to the police officers (R. 24, 26). The

officers decided to keep both the respondent and George Ash under surveillance (R. 24).

The two men stopped in front of a liquor store, whereupon respondent got out of the car, the motor of which was still running, and entered the store (R. 24). Ash, the driver of the car, upon seeing the officers "took off" down the street with a burst of speed. The officers, using the siren, gave chase. After several blocks the officers overtook the car (R. 25). Ash was ordered out of the car and asked why he had fled. His reply was that "McNamara had scared him" (R. 25). The officers looked in the car and, after some conversation, let Ash go on his way in the hope that Ash would lead them to Painten (R. 26).

The officers discovered that Painten had an apartment on Dartmouth Street, in Boston's South End (R. 26). They went to the apartment building and found the car that Ash, when pursued, had been driving (R. 26). A check of the front door of the apartment building disclosed respondent's name under one of the bells (R. 26). Upon this discovery, Officer McNamara put in a radio call for two more officers (R. 27).

When the other officers arrived, McNamara informed them that they were "going up to see some fellows in an apartment," and assigned them to watch the front and rear of the building (R. 27). Officers McNamara and Maxwell then proceeded upstairs and knocked on the respondent's door. Respondent answered the knock, by opening the door only a few inches. He asked: "Who's there?" McNamara showed his badge and replied: "It's the police. We'd like to talk to you." Respondent asked the police to wait a minute. McNamara replied that they would, and respondent closed his door. While the door was closed, McNamara heard inside the apartment a sound like that of a window being raised and lowered. The officers

patiently waited for a few seconds, until respondent reopened the door. McNamara and Maxwell were then admitted to the apartment by the respondent (R. 27).

Inside the apartment, the officers found George Ash and a woman (R. 27). Respondent stated that the apartment was his. There was some conversation between McNamara and the occupants of the apartment. No search either of respondent's person or of his apartment took place at this time (R. 27-28).

About three minutes after McNamara and Maxwell were admitted to the apartment, the officer stationed in the rear of the building came up to the apartment and said: "They threw a bag out the window" (R. 28). This bag had landed on the fire-escape directly under the corner window of respondent's kitchen, the window from which the bag was dropped. The officer went down the fire-escape from the third floor (R. 52) to the second-floor level and retrieved the brown paper bag (R. 28). In the kitchen of respondent's apartment, McNamara opened the bag and discovered, wrapped in three sheets of waxed paper, a .32 caliber automatic and a .45 caliber revolver, together with nine .32 caliber bullets and thirteen .45 caliber bullets scattered about the bag (R. 28). Respondent stated that he knew nothing about them. (Later, at the evidentiary hearing before the District Court on his petition for writ of habeas corpus, he admitted that the guns belonged to George Ash (R. 19).) McNamara thereupon placed the respondent under arrest. He then proceeded to search the apartment (R. 28).

During the search of the apartment, the officers seized a box of .32 caliber shells found in respondent's kitchen and money (about $980) found under the mattress in respondent's bedroom. The officers also seized a roll of waxed paper because its edge matched the edge of the waxed paper in which the guns had been wrapped (R. 28, 37-38).

During the weekend, F.B.I. agents made a list of the serial numbers of the money found in the apartment. The serial numbers of some of the bills matched those of bills that had been taken in the robbery of the People's National Bank in Marlboro, Massachusetts (R. 37).

The seized articles and the serial numbers of the bills were introduced at respondent's trial for robbery of the People's National Bank.

Argument.

I. The Actions of the Police were Proper at Each Moment of Their Encounter with the Respondent, and the Officers' Supposed Intentions are Irrelevant.

The Court of Appeals has said in the decision below that the police, "knowing of a crime" and knowing that the respondent and his companion were suspicious characters, set out to arrest and search the men "in the hope that evidence would develop" (R. 64). This view—that the police were initially, at least, on a fishing expedition—apparently led the court to arrive at what we submit is an untenable result, namely that the actions of the police, although reasonable and lawful at each moment of their encounter with the respondent, were somehow tainted because of the officers' initial reasons for investigating the respondent.

The Commonwealth respectfully submits that a review of the record will show that the officers' entry into the respondent's apartment was legal, was free from coercion, and was with the consent of the respondent; that thereafter circumstances constituting clear probable cause for the arrest of the respondent came to the officers' attention; and that the ensuing search and seizure were incidental to a valid arrest. The Commonwealth further submits that speculation as to why the officers went in the first place to

the apartment of the respondent is immaterial, so long as their conduct, measured by objective standards, was proper. No decision of this court has gone so far as to suggest that an otherwise lawful arrest, and search and seizure incidental thereto, are rendered unlawful on the basis of speculative testimony as to the private hopes or thoughts of the officers involved. The only requirement or standard set down is one of reasonableness. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In *Ker* v. *California*, 374 U.S. 23, 34 (1963), this court said: "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." The courts of the Commonwealth of Massachusetts have been zealous in protecting the rights of defendants and have formulated reasonable and workable rules regarding arrests, searches and seizures which, we submit, do not violate the Fourth Amendment of the Constitution of the United States.

The law of the Commonwealth was stated as early as 1853, when the Supreme Judicial Court, in the case of *Commonwealth* v. *Carey*, 12 Cush. 246, 251, held that an arrest was not unlawful if the police officer suspected one on his own knowledge of *facts*, or facts communicated to him by others, and thereupon had *reasonable grounds* to believe that the accused had been guilty of a felony. In accord, see *Commonwealth* v. *Phelps*, 209 Mass. 396, 404; *Commonwealth* v. *Lehan*, 347 Mass. 197, 206; *Commonwealth* v. *Roy*, 349 Mass. 224, 230. This rule sets forth an objective standard for determining the validity of an arrest, and does not call for analyzing the mental process of each law-

enforcement official. The idea of a subjective standard has been rejected, and, we believe, properly so. ". . . the Commonwealth should not be conclusively bound or limited by the officer's choice of words made subjectively in the active execution of his duties." *Commonwealth* v. *Lawton,* 348 Mass. 129, 132.

More recently, the Commonwealth reiterated its position on the arresting officer's state of mind in the case of *Commonwealth* v. *Balloy,* 350 Mass. 751; cert. den. 385 U.S. 1031. At page 756 the court states:

> "The captain's testimony that he considered the defendant to be under arrest before coming within five feet of him and before a word was spoken or any physical restraint imposed was an opinion on a matter of law which does not estop the Commonwealth or foreclose the courts. *Commonwealth* v. *Lehan,* 347 Mass. 197, 205, 207. *Commonwealth* v. *Lawton,* 348 Mass. 129, 132-133. The trial judge in effect so ruled, and correctly."

There are compelling and obvious reasons for the adoption of an objective rather than a subjective standard in determining the existence or non-existence of probable cause for an arrest. How can one possibly ascertain the real motives of any person, including a police officer, for doing what he does? Moreover, it would seem obvious that, for Fourth and Fourteenth Amendment purposes, what a police officer does is more important than what he thinks. A police officer's state of mind cannot violate the constitutional rights of an accused; only his actions can violate the rights of an accused. If the courts are to attempt to decide a case based solely on the thinking of the police as opposed to overt acts, the result will place a premium on prevarica-

tion and on the giving of smooth and bland reasons by carefully coached police witnesses. Moreover, it will be impossible to ascertain in advance whether a particular search was or was not legal.

It is only reasonable to assume, of course, that the police in the instant case would not have gone to the apartment of the respondent if they did not suspect that he had some connection with a crime. This is probably true in most instances where a police officer goes to the home of a person with a reputation similar to that of the respondent. What counts is what the officer does when he arrives at the home of a suspect, and whether what he does violates any substantive rights of the respondent. The officer's testimony as to his own personal reasons for going to the respondent's house is irrelevant.

If the decision of the Court of Appeals is allowed to stand, it will become a dangerous and far-reaching precedent for all law-enforcement officials. Under the decision of the Court of Appeals, the attitude of police officers would necessarily have to be: "Don't think, or your subsequent actions will be invalid." Even worse, police officers would feel compelled to give reasons other than the true ones.

Just as an individual cannot be arrested for what he thinks—just as he must first commit some overt act which constitutes a crime—so a police officer should not be precluded from making an arrest merely because he has private thoughts of his own. So to hold would severely hamper the prosecutions of crime throughout the country. With the increase in crime across the nation, law-enforcement officials need help, not hindrances, in protecting the interests of society. This court can give law-enforcement officials this help while, at the same time, this court can insist that, by every objective standard, proper regard be paid to the protection of the rights of the accused.

No Court of Appeals in Any Other Circuit has Adopted a Subjective Standard to Determine Probable Cause for Arrest.

After a diligent search we are unable to find in the other circuits any authority which supports the use of a subjective test for determining probable cause for the arrest of an accused. The idea was, moreover, explicitly rejected by the Ninth Circuit.

In the case of *Cutchlow* v. *United States,* 301 F. 2d 295 (9th Cir., 1962), three officers went to the home of the defendant, armed with a warrant for the arrest of one James Turner and a detention warrant for the defendant issued pursuant to an Oregon statute. As the officers approached the house, they observed the defendant and one David Jones walking toward the house. When the defendant and Jones noticed the officers, they hastened into the house. The officers immediately encircled the house, one in the rear, one at the side and one at the front door. The officers heard a loud banging noise (in the rear of the house) and a sound as though a rear window were being thrown open and a screen torn. An instant later, a jar landed almost at the feet of the officer in the rear. The officers then entered the front door, which was being opened by Jones. The officers, passing Jones, went into the living room, wherein they observed the defendant coming from the back of the house. The defendant was informed of the detention order and asked to sit down. At this time, federal narcotics agents arrived. A field test for heroin made on the substance found in the jar proved to be positive. The defendant was taken to police headquarters. The defendant claims that the approach of the officers so fright-

ened her that she "cast her constitutional rights out of the window." The court stated at page 297:

> "The officers had the lawful right and duty to approach appellant's residence in seeking Turner for whose arrest they had a valid warrant. There was no misconduct in the manner of their approach and considering the actions of appellant and her then unidentified companion Jones, the officers were justified in attempting to surround the house to prevent the possible alerting and escape of Turner. *Whatever intent or purpose may have been in their minds, no improper or unlawful act of any kind was committed by any of the officers prior to the jar containing heroin being thrown out of the window at the officer's feet.* In the circumstances there was no reason in fact or law why the jar should not have been recovered and its contents examined by the officers at the scene. The heroin exhibit was legally obtained and properly admitted into evidence." (Emphasis supplied.)

Cutchlow is similar to the case at bar. In *Cutchlow,* suspicion was aroused by the act of the defendant in hastening into the house after seeing the officers. In the case at bar, suspicion was aroused by the sudden flight of the respondent's companion, Ash, upon seeing the officers (R. 25). In both cases there was no misconduct on the part of the police in the manner in which they approached the defendant and the respondent. In both cases, neither was there forcible entry, nor was admission of police to the respective apartments gained by trickery. The same considerations which compelled the rejection of a subjective test in *Cutchlow* also compel a rejection of the subjective test in the instant case.

II. The Record does Not Support the Holding of the Court of Appeals.

The Court of Appeals seems to have concluded from the testimony of Officer McNamara that he had personal motives which tainted both the subsequent arrest and the search and seizure. The pertinent testimony is as follows:

> "Q: Was it your opinion, Mr. McNamara, something was going on in that household to give you reason to enter the household without a warrant?
>
> "A: Yes, sir.
>
> "Q: Can you state to the Court what that was?
>
> "A: Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes." (R. 32.)
>
> "Q: When he returned to the South End, as you might expect, for the company of Painten whom he had left just earlier, what gave you reason to feel that you had the grounds to enter the apartment when you did not have reason to pick them up when they were together in the car?
>
> "A: When I first saw them, and saw Painten going in the liquor store, I felt this might be a liquor store holdup. The situation changed. Shortly after, when Ash panicked and gave us chase around the South End, and now we have them together in the apartment and the holdup of the loan company is in my mind now, since there is no liquor store holdup, and I find out he is hiding there, these things in my mind lead me to arrest him for that holdup.
>
> "Q: That is the only basis, the reason for arresting him for the finance company holdup?
>
> "A: Because of their records and association and the officer coming in, and discovering the guns." (R. 34-35.)

We submit that the last answer of Officer McNamara clearly indicates that he had no intention to arrest the respondent until after the discovery of the guns. The guns were not discovered until the police had already been admitted into the apartment. Therefore, prior to the officers' admission into the apartment, there could have been no intent to arrest the respondent.

The strongest indication of the fact that Officer McNamara did not intend to arrest the respondent upon going into the apartment is the officers' conduct at the front door. The respondent went to the door, saw the officers, and asked them if they would wait a minute. *The officers agreed, and the respondent closed the door* (R. 27). Clearly, if the officers intended either to arrest the respondent or to make a forcible entry, they would not have permitted the respondent to close the door. They would certainly realize that, by allowing the respondent to close the door, they gave him opportunity either to escape or to dispose of evidence. Nevertheless, the officers waited patiently until the door was reopened by the respondent (R. 27).

III. There was No Violation of the Respondent's Constitutional Rights under the Fourteenth Amendment of the Constitution of the United States.

The petitioner contends that the articles obtained by the officers in the apartment of the respondent were not obtained through an unreasonable search and seizure. In so contending, the petitioner relies on the fact that the police officers were voluntarily admitted by the respondent into the apartment; that at the time of the arrest, which occurred in the apartment, the police had probable cause to make the arrest; and that the articles found during the search of the apartment were lawfully seized.

A. The Respondent Consented to the Entry of the Police into the Apartment.

The facts as found by the District Court indicate that the respondent consented to the entry of the police into his apartment. "Leaving Megnia to guard the stairway, McNamara and Maxwell went to Painten's third floor apartment and knocked on the door. Painten answered the door, opening it only a few inches, and asked 'Who's there?' McNamara showed his badge and replied, 'It's the Boston Police. We'd like to talk to you.' Painten asked if they would wait a minute, McNamara replied that they would, and Painten closed the door. While the door was closed McNamara heard what sounded like a window being raised and lowered inside the apartment. A few seconds later Painten opened the door. McNamara and Maxwell entered the apartment" (R. 52).

We recognize, of course, that entry into the living quarters of a defendant *demanded under color of office* can involve a submission to authority rather than an understood and intentional waiver of a constitutional right. *Johnson* v. *United States*, 333 U.S. 10, 13 (1948). In *Johnson*, the police received information from a confidential informer that unknown persons were smoking opium in a certain hotel room. The officers went to the hotel, where they recognized a strong odor of burning opium coming from a room. The officers did not know who was occupying the room. The officers knocked at the door and stated that they wanted to "talk a little bit." The defendant opened the door and, according to the officers, "stepped back acquiescently and admitted us." One officer then said: "I want to talk to you about this opium smell in the room here." The defendant denied that there was such a smell. The officer then said: "I want you to consider yourself under arrest because we are going to search the room."

The search uncovered opium. This court ruled that "An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion." 333 U.S. 10, 17.

However, in the case at bar, the respondent requested the officers to wait a moment. They complied with his request. They did not attempt to force an entry and they did not attempt to demand entry. The defendant was obviously not in fear. Instead, the officers patiently waited for him to reopen his door. Neither such a request to wait nor compliance with such a request are to be found in the *Johnson* case. It should be noted in *Johnson* that there was sufficient evidence to enable the officers to procure a search warrant. We submit that the most serious consequences to law enforcement would result if the *Johnson* case is not limited to those factual situations where there is either some evidence of, or suggestion of, coercion by the officer, or fear on the part of the defendant.

There appears to be no other post-*Johnson* decision of this court involving access by police officers to the premises of a defendant where consent for police officers to enter his premises was in issue. However, there have been cases decided by the Courts of Appeals which hold that, under circumstances similar to those in the case at bar, consent had been given: *Davis* v. *California,* 341 F. 2d 982 (9th Cir., 1965); *Chapman* v. *United States,* 346 F. 2d 383 (9th Cir., 1965); *Robbins* v. *MacKenzie,* 364 F. 2d 45 (1st Cir., 1966); cert. den. 385 U.S. 913; *United States* v. *Cachoian,* 364 F. 2d 291 (2d Cir., 1966).

In the case of *Davis* v. *California, supra,* the court found that the officers were voluntarily admitted to the motel room, where they had followed a woman, knocked on the door, displayed their badges, identified themselves as police officers,

told her that they were investigating narcotics activity, and stated that they wanted to talk to her.

In *Chapman, Robbins* and *Cachoian* the courts found that the officers were voluntarily admitted to the premises. From a factual point of view, these cases are very similar to the case at bar.

In *Chapman* the F.B.I. was investigating the theft of certain bank property. When the officers went to the home of the defendant, they knew only that she was a former employee of the bank in the section where the documents were missing and that she had refused to return her key to the office upon request of the office. The officers rang the doorbell, identified themselves, stated they were investigating the loss or theft of papers from the People's Bank and asked to enter and talk to her. The court found that the defendant gave her consent.

In *Robbins* the police knew that the defendant had been convicted of a crime similar to the one under investigation. They went to the rooming house where the defendant was staying and stationed one officer at the back door. The officer at the front door knocked. When the officer received a response, he identified himself and stated that he wished to talk with the defendant. The defendant opened the door and walked back into the room. The court found that here the unlocking and opening of the door was consent to talk with the officers, and that the walking back into the room was an implied invitation to conduct the talking inside the room.

In *Cachoian* two government agents went to the defendant's apartment while another agent went into the courtyard of the adjoining apartment house. The two agents heard voices inside the apartment and knocked. Nobody answered. To a second knock a voice responded. The agents identified themselves and stated that they wanted to talk

with the defendant. There was a silence; then the agents knocked again. The defendant opened the peephole and the agents displayed their badges. The defendant then requested the agents to wait until his wife got dressed. While they were waiting, the agents heard a flushing of a toilet and the opening and closing of a window. When the defendant returned to the door, he asked if the agents had a warrant; they said "No," that they merely wanted to talk to him. In requesting entrance, the agents used an "authoritative law enforcement" tone of voice. Meanwhile, the agent in the courtyard saw someone dressed in a white shirt and dark tie open the window and make a throwing gesture. The agent felt something hit him; the object proved to be a package of glassine envelopes containing heroin. The first two agents were admitted into the apartment. When the third agent entered the apartment, he saw he defendant dressed like the man who had both opened the window and made the throwing gesture. The court finding that there was consent for the agents to enter, stated at page 292:

> "Here, appellant probably believed that he was in the clear, having thrown the contraband out the window."

In *Chapman, Robbins* and *Cachoian* the police did not use any force, threat or coercion to gain entry. In the case at bar the police did not use any force, threat or coercion to gain entry. In all cases the police knocked on the door, identified themselves, stated their purpose. In all cases the police were admitted to the apartments. Admission under these circumstances indicates consent by the respondent for the police to enter the apartment. While this court is, of course, not bound by the Courts' of Appeals decisions analyzed above, we submit that this rationale is

both persuasive and, indeed, compelling, and should be adopted in the present case. If it is adopted, the conclusion is inescapable that the officers, in the case at bar, were legally on the premises.

As a practical matter, if no consent to enter the apartment is found under the circumstances of the case at bar, it is very unlikely that consent could *ever* be found in a case where a police officer goes to the home of a person, asks to be admitted, states his purpose, and, after being admitted, discovers evidence which gives rise to the arrest of the occupant. Such a holding would have a devastating effect on law enforcement for the reason that officers would be afraid ever to go to the home of a suspect to question him as a part of the investigative process, if there was any likelihood that evidence would come to the officers' attention while they were on the premises. It would be most undesirable to hold —without any evidence of threat or coercion—that law-enforcement officers are precluded from calling on persons, from identifying themselves, and from asking to be admitted for purposes of conversation with the resident. This is not to say that the court should not scrutinize very carefully the conduct of an officer. If under all the circumstances his admittance appears to be the result of coerced submission to authority—if he attempts to search the premises—the *Johnson* rule should apply. But, in facts like the present case, we submit that the entry must be held lawful.

B. Under the Reasonable Standards Adopted by the Courts of Massachusetts, the Police had Probable Cause to Arrest Respondent.

Shortly after the police entered the apartment of the respondent, the officer who had been stationed at the rear of the building came up to the apartment and stated that a bag had been thrown out of one of the windows (R. 28). The

bag was retrieved and opened. The bag contained two guns and bullets wrapped in wax paper (R. 28). The police then placed the respondent under arrest (R. 28).

In determining whether or not an arrest is valid, the court must look to see if probable cause existed at that moment. *Beck* v. *Ohio,* 379 U.S. 89 (1964). At the moment of the arrest of the respondent the following facts were known to the officers:

1. There had been a number of liquor-store holdups and other holdups in the general area of the officers' patrol. The officers observed that the respondent and his companion drove their car alongside of a liquor store on Columbus Avenue and that the respondent went inside the store while his companion remained inside the car which had its motor running (R. 24).

2. From a photograph in the pocket of Officer McNamara, the officers recognized the respondent. The respondent's companion, George Ash, was known to the officers. The officers knew that both men had criminal records (R. 25-26, 33).

3. While he awaited the return of the respondent to the car, George Ash recognized the police officers and took off in a burst of speed. The officers gave chase and finally caught Ash (R. 25).

4. The officers permitted Ash to leave in the hope of finding the respondent. When the officers arrived at the apartment of the respondent they heard what sounded like a window being raised and lowered (R. 26-27).

5. Before going into the apartment, Officer McNamara called for additional help (R. 27). When the additional officers arrived, one was stationed in the rear of the apartment building. This officer there observed something being thrown out of the window of the respondent's apartment (R. 28).

6. The officer who had been stationed in the rear of the building came upstairs, went through the third floor apartment (R. 52) to the fire escape on the second floor and there discovered a bag containing both guns and bullets (R. 28).

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949). The Commonwealth contends that the above-stated facts would warrant the prudent man in *Brinegar* to believe that the respondent had committed the crime of robbery.

In the instant case, probable cause arose after the police were validly inside the apartment of the respondent. The same was true in *Ker* v. *California, supra,* with respect to the petitioner, Diane Ker.

> "Probable cause for the arrest of petitioner Diane Ker, while not present at the time the officers entered the apartment to arrest her husband, was nevertheless present at the time of her arrest. Upon their entry and announcement of their identity, the officers were met not only by George Ker, but also by Diane Ker, who was emerging from the kitchen. Officer Berman immediately walked to the doorway from which she emerged and, without entering, observed the brick-shaped package of marijuana in plain view. Even assuming that her presence in a small room with the contraband in a prominent position on the kitchen sink would not alone establish a reasonable ground for the officers' belief that she was in joint possession with her husband, that fact was accompanied by the officers' information that Ker had been using his apartment as

> a base of operations for his narcotics activities. Therefore, we cannot say that at the time of her arrest there were not sufficient grounds for a reasonable belief that Diane Ker, as well as her husband, was committing the offense of possession of marijuana in the presence of the officers." 374 U.S. 23, 36-37.

In the case at bar the respondent attempted to dispose of the guns and bullets in his apartment by tossing them out onto the fire-escape below. The discovery of the guns and bullets by the police after the officers were validly inside the apartment was a fact which, when coupled with other facts known to the officers, gave them reasonable cause to believe that the respondent had committed the crime of robbery. However, the Court of Appeals ruled that the act of the respondent in throwing the guns out of the window was involuntary and that he was forced to hurl the guns from his window because of the actions of the police. To support this holding the Court of Appeals cites the Eighth Circuit case of *Hobson* v. *United States,* 226 F. 2d 890 (8th Cir., 1955).

The Commonwealth submits that reliance on the *Hobson* case is misplaced. In *Hobson,* defendant's wife—but not the defendant himself—had been under surveillance for years. On March 22, 1955, she participated in an illegal sale of narcotics, during which sale she was observed by a narcotics agent. On April 20, this agent, along with two Kansas City police officers, went to the residence of the defendant for the purpose of arresting his wife for the March 22nd offense. The officers did not have either a warrant of arrest or a search warrant. The defendant and his wife lived with the wife's mother in a private home. Upon arrival at the house, one officer went to the back of the house for the purposes of apprehending anyone who might try to get out and of recovering any evidence that might

be thrown out from the house to the rear of the premises. The defendant's wife appeared at the door in her slip. The officers identified themselves and demanded admittance. About this time the officer in the rear shouted, "He threw some stuff out of the window." The officers at the front door then made a forced entry. The defendant had thrown a package into his own back yard. At the time of entry, the contents of the package were unknown. The court ruled that the backyard was part of the protected curtilage of the defendant's home, and the defendant violated no law merely by throwing a package out of the window into his own back yard. The court further ruled that the defendant's act of throwing the package was involuntary, forced by the actions of the officers.

In the case at bar, the police had reason to believe that the respondent had committed an offense even though at that time their suspicion fell short of probable cause. In *Hobson* there is no indication of suspicion focussing on the defendant. In the instant case there was no forcible entry as there was in *Hobson*. In the instant case, the police felt that the respondent might have committed an offense; they set out to talk with him. There was no guise of arresting a third party to gain entry; instead, the police were straightforward in requesting the respondent to admit them into the apartment.

C. The Articles Found During the Subsequent Search were Lawfully Seized.

After the respondent was arrested, the officers proceeded to search the apartment. This search revealed, in addition to the guns and bullets previously recovered, a box of bullets and a large sum of money found under a mattress in the bedroom. A roll of wax paper was also seized because its edge matched the edge of the paper in which the guns

had been wrapped (R. 28, 37-38). This search was incidental to a valid arrest; it was, therefore, lawful. *Weeks* v. *United States,* 232 U.S. 383, 392 (1914). *Agnello* v. *United States,* 269 U.S. 20, 30 (1925). *Harris* v. *United States,* 331 U.S. 145, 150-152 (1947). *Draper* v. *United States,* 358 U.S. 307, 310-311 (1959).

The guns, bullets and money seized during the search were either instrumentalities and means by which a crime could be committed, or fruits of the crime. These objects were therefore properly seized. *Agnello* v. *United States, supra.* The only other item seized during this limited search of the respondent's apartment was a roll of wax paper. This seizure, too, was lawful for the reason that mere evidence can also be seized. *Warden* v. *Hayden,* 35 U.S. L. Week 4493 (May 29, 1967).

The scope of the search was reasonable.

The scope of the search, the Commonwealth contends, was reasonable. Articles were discovered in the bedroom and in the kitchen of the respondent's apartment. The facts do not indicate in which room the arrest was made. However, the Commonwealth submits that the arrest was lawful, and that, even in the absence of a search warrant, there is a permissible area of search beyond the person. *Harris* v. *United States, supra. Agnello* v. *United States, supra. United States* v. *Rabinowitz,* 339 U.S. 56, 61 (1950).

The Commonwealth does not contend that a general exploratory search is reasonable. *United States* v. *Lefkowitz,* 285 U.S. 452 (1932). However, there is no precise formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances. *Go-Bart Importing Co.* v. *United States;* 282 U.S. 344, 357 (1931). In the case at bar, the respondent was arrested on suspicion of the crime of robbery. The search was, therefore, spe-

cifically directed both to the instrumentalities by which the crime could be committed and to the fruits of the crime.

Another factor to be considered is the control of the premises. This court has held that, where an arrest was made on premises under the control of the person arrested, a search of those premises was lawful. *United States* v. *Rabinowitz, supra,* 339 U.S. 56, 61 (1950). The fact that the apartment was in possession of the respondent is undisputed. His control extended not only to the room in which he was arrested, but also to the entire apartment.

The articles searched for, *i.e.*, instrumentalities and fruits of the crime, could possibly have been concealed in any room of the respondent's apartment. The search was neither a situation where the articles, by virtue of their size, could have been more readily detected, and where, consequently, the search should have been less extensive, *Harris* v. *United States, supra,* 331 U.S. 145, 149, 152, nor a situation where the police conducted a search of general, indiscriminate exploration; this search, on the contrary, was narrow, reasonable, and conducted for a specific, limited end.

In light of both the nature of the articles searched for and the control of the premises by the respondent, the Commonwealth contends that the search of the entire apartment was reasonable.

IV. The Respondent is Without Standing to Suppress the Introduction into Evidence of the Guns which he Abandoned.

While the policemen waited at the front door for the respondent to admit them, a police officer stationed at the back of the building saw a bag thrown out of respondent's third floor (R. 52) apartment (R. 28). This bag, which landed on the fire-escape below, proved, upon examination, to contain two guns (R. 28). The respondent claims that he has standing to suppress such evidence. *Jones* v.

United States, 362 U.S. 257, 261 (1960), sets forth the prerequisites for standing. A person aggrieved by an unlawful search and seizure must show (1) that he is the victim of a search or seizure and (2) that he has a sufficient interest in the property seized. The respondent in the present case fails to show standing. The throwing of a bag out of the window is an act of volnntary relinquishment of one's property. His act was designed to conceal from the police his possession of the guns. *United States* v. *Cachoian, supra.* This court has held that the discarding of evidence by the defendant constitutes abandonment. In *Abel* v. *United States,* 362 U.S. 217, 240-241 (1960), the petitioner sought to suppress two items found by an F.B.I. agent after the petitioner had vacated his hotel room. The court said that the F.B.I. agent's seizure of such items was lawful because petitioner had abandoned those items. "He had thrown them away. So far as he was concerned, they were *bona vacantia.* There can be nothing unlawful in the Government's appropriation of such abandoned property. See *Hester* v. *United States,* 265 U.S. 57, 58."

In *Hester* v. *United States, supra,* the plaintiff in error claimed that the seizure of a jug of illicitly distilled whiskey which he dropped while he was fleeing police was inadmissible. The court said: ". . . there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned." 265 U.S. 57, 58.

V. The Officer's Use of the Apartment as a Passageway so as to Retrieve the Guns from the Fire-Escape is, at Best, a Mere Trespass, and does Not Entitle the Respondent to Suppress the Guns.

While Officers McNamara and Maxwell were in the respondent's apartment, the officer assigned to the rear door

entered the apartment and informed them that a bag was thrown from the respondent's window onto the fire-escape below. The officer then went through the apartment to the fire-escape and retrieved the bag (R. 28). The concurring opinion of the Court of Appeals finds this conduct unlawful and holds that the officer improperly used the respondent's apartment as a "conduit of convenience" for seizing the bag on the fire-escape. Such conduct, however, is at most a mere trespass, which cannot be held to invalidate an otherwise proper seizure. *Hester* v. *United States, supra:*

> "It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure." 265 U.S. 57, 58.

See also *Lee* v. *United States,* 308 F. 2d 715, 717-718 (4th Cir., 1962), which presents a situation similar to the case at bar.

Conclusion.

Many law enforcement officials feel that recent decisions of this court have hampered the effective enforcement of the laws of the several states and the country. However, the Commonwealth of Massachusetts has not adopted this attitude. Indeed, many of the rules safeguarding the rights of an accused enunciated by this court in recent decisions have been a part of our law for many years. These safeguards are evident in a section of our General Laws termed "Rights of Persons Accused of Crime" (G.L. c. 263, §§ 1-9). Because we have always zealously guarded the rights of those persons accused of crime, the Commonwealth of Massachusetts has rarely sought certiorari in any case involving constitutional rights. However, the decision of the Court of Appeals is completely opposite to the workable

rules established by the Commonwealth regarding searches and seizures; it shifts the test of illegal searches and seizures from one of overt acts to one of thoughts of the police. It suggests that a police officer, simply because he is such, cannot make a lawful entry into a residence with the consent of the occupant. It suggests that, once entry is lawfully gained onto the premises, probable cause cannot be established when evidence of a crime is discovered without a search. It suggests that police officers should be more like mechanical men rather than human beings with freedom of thought. Such a decision would destroy both existing morale and incentive for conscientious law enforcement. For these reasons the petitioner respectfully requests that this court affirm—

(1) That the states are still free to establish workable rules in investigations and in law enforcement;

(2) That the Commonwealth of Massachusetts has established workable rules which are reasonable safeguards both for the accused and for the police;

(3) That the subjective standard applied by the Court of Appeals is not and should not be the test adopted by the Commonwealth.

Therefore the Commonwealth respectfully submits that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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